

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION

In re: )  
 )  
SECURITIES AND EXCHANGE )  
COMMISSION, )  
 )  
Plaintiff, )  
 )  
vs. ) Case No. 2:23-CV-00159  
 )  
GREEN UNITED, LLC a Utah )  
limited liability )  
company, et al, )  
 )  
Defendants. )  
 )  
\_\_\_\_\_ )

BEFORE THE HONORABLE BRUCE S. JENKINS

September 8, 2023

Motion to Dismiss for Failure to State a Claim

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Salt Lake City, Utah September 8, 2023

(10:00 a.m.)

9 MR. WELSH: Good morning, Your Honor. Michael  
10:00:45 10 Welsh on behalf of the SEC. With me is my co-counsel Casey  
11 Fronk.

12 THE COURT: Okay.

13 MR. GANNON: May it please the court, my name is  
14 Steve Gannon. I represent Green United, LLC and Mr. Wright  
10:00:58 15 Thurston. And with me is my co-counsel Cameron Matheson.

16 THE COURT: Okay.

17 MR. KRYSA: Good morning, Your Honor. Thomas  
18 Krysa from Foley & Lardner with Stephanie Adamo, my  
19 colleague. We represent defendant Kristoffer Krohn. And  
10:01:15 20 David Jordon also is representing Mr. Krohn but  
21 unfortunately he couldn't be here today.

22 THE COURT: Okay. Well, let's take the Thurston  
23 motion first.

24 MR. GANNON: Good morning, Your Honor. And again  
10:01:34 25 may it please the court. This case has to do with whether

1 the long-standing definition of a security, accepted and  
2 repeatedly upheld by the Tenth Circuit and the Supreme Court  
3 of the United States, can unilaterally be altered by the  
4 SEC. It cannot.

10:01:50 5 The facts involve simple actions, sales of  
6 hardware and software pursuant to a contract. It is most  
7 definitely not the sale of a stock nor anything remotely  
8 resembling a stock, nor is it the type of transaction in  
9 which stock is often given as is required by the Tenth  
10 Circuit under *McGill versus American Land & Exploration* for  
11 an investment contract to exist.

12 That is dispositive because the SEC's complaint  
13 fails to allege facts supporting the critical element, a  
14 common enterprise, upon which its case depends. If there is  
15 no common enterprise, there can be no investment contract.  
16 If there is no investment contract, there can be no security  
17 and the SEC's claims fail as a matter of law.

18 The SEC insists that its complaint describes an  
19 investment. But it seems to have forgotten that while all  
20 securities are investments, not all investments are  
21 securities. But, of course, the complaint also includes  
22 other disjointed claims of misstatements, deception, and  
23 fraudulent schemes. So it's important to remember that what  
24 is alleged before Your Honor, is the product of a nearly  
25 five-year nonpublic governmental investigation, conducted

1 with subpoena power, resulting in thousands of pages of  
2 documents and an unknown number of witnesses, but at least  
3 hundreds of pages of transcript. And so there is no excuse  
4 for any lack of specificity in the complaint's allegations.

10:03:19 5 Those allegations, Your Honor, cover a period of  
6 greater than 1,735 days, but with misstatements alleged on  
7 only two of them and with misstatements alleged by my  
8 client, Wright Thurston, on exactly none of them. This is  
9 not an offering memorandum case. There is no prospectus.

10:03:40 10 The supposedly offending statements are alleged to have been  
11 made face-to-face or in major part through some unknown  
12 electronic media on unknown days, with unknown content, to  
13 unknown persons. Unknown after almost five years.

14 For our purpose, however, what needs to be known  
10:04:00 15 can be found in the underlying contract which defendants  
16 have brought to this court's attention because the SEC, not  
17 surprisingly, excised any hint of its existence from the  
18 complaint, much as it excised the key language from its  
19 description of the controlling case in the Tenth Circuit  
10:04:16 20 *McGill*.

21 For the SEC to even be in court, it must be able  
22 to plead a security. Where here it describes -- which here  
23 it describes as an investment contract arising out of the  
24 three part test form of the Supreme Court in *SEC versus*  
10:04:31 25 *Howey*. That is, there must be one, an investment of money;

1 two, a common enterprise; and three, with an expectation of  
2 profits solely from the efforts of others.

3 And here, the allegations of the complaint, as  
4 well as the language of the contract, are dispositive of  
10:04:49 5 that issue. Unlike the *Howey* contract, which provided  
6 contractual rights for investors to share in the profits of  
7 the enterprise from the sale of oranges, this is the exact  
8 opposite. The contract here provides no rights whatsoever  
9 to ownership in or to share in the profits or the losses of  
10:05:09 10 Green United which the complaint describes as the operating  
11 entity and as the enterprise. And it also includes ample  
12 cautionary language that the value of what it may produce  
13 will be dependent on the actions of the customer. The  
14 allegations of the complaint do not say otherwise.

10:05:25 15 The SEC's fraud allegations suffer from similar  
16 contradictions. Despite it's argument that this is a  
17 classic fraud case, the SEC admits the complaint does not  
18 allege even one false statement uttered by Roy Patterson --  
19 Wright Thurston, pardon me. Compounding the upside down  
10:05:43 20 nature of that argument, classic fraud is usually  
21 accompanied by losses suffered by individuals whose interest  
22 the SEC purports to represent.

23 In this case, to the contrary, we have an amicus  
24 brief from nearly 50 Green United customers telling the  
10:05:57 25 court they have not been defrauded, they have received what

1       they bargained for, and that any harm they are suffering is  
2       being imposed on them by the SEC and they want the SEC to  
3       stop.

4                   In short, after a four and a half year marathon,  
10:06:11 5       these were a set of fatally incomplete allegations and a  
6       fruitless search for a federal cause of action and nothing  
7       more.

8                   This morning with Your Honor's indulgence we will  
9       review the four fatal flaws in the SEC's complaint each of  
10:06:25 10      which require its dismissal. First, we will demonstrate  
11       that the SEC has not and cannot make allegations that there  
12       is a common enterprise supporting its allegations of an  
13       investment contract. That alone is dispositive and the  
14       court needn't go no further.

10:06:41 15                   Second, we will examine the SEC's failure to make  
16       any allegations of fraud against our client Wright Thurston  
17       with any of the specificity required under Federal Rule of  
18       Civil Procedure 9(b) .

19                   Third, we will establish the SEC's failure to  
10:06:57 20       comply with the due process clause, given its lack of fair  
21       notice to the digital-asset industry participants, and the  
22       arbitrary and capricious nature of its impossible demands to  
23       the industry regarding its hollow offer to come in and  
24       register.

10:07:11 25                   And fourth, dismissal is required because the

1 Supreme Court has repeatedly held that in matters which  
2 revolve around what Justice Barrett described as "big time  
3 policy decisions" the Major Questions Doctrine requires that  
4 questions regarding the nature of digital-assets and federal  
10:07:28 5 jurisdiction over them, be resolved by the congress and not  
6 by unelected administrative agencies.

7 Of course, we begin with the facts because that  
8 is what the law must be grounded in. And here, the SEC's  
9 claim hinges on the existence of an investment contract but  
10:07:49 10 it studiously avoids the actual contract itself in the  
11 complaint. That is because far from granting an ownership  
12 interest or making promises of profit or any kind of return,  
13 the contract actually ends the SEC's case. And we have a  
14 demonstrative slide, Your Honor, that will show you the key  
10:08:07 15 language. If we could bring that up.

16 This is Section 8.1 of the terms and conditions  
17 and I'll read it, "License of a Green Soft Node or ownership  
18 of a Green Box or use of Green Services does not represent  
19 or constitute any ownership interest, right or stake, share  
10:08:31 20 or security, debt or equivalent right, or any right to  
21 receive any future revenue or form of participation in or  
22 relating to any blockchain or cryptocurrency, including the  
23 Green Blockchain or Green Reward."

24 Plainly, contract grants nothing like an  
10:08:50 25 ownership interest in anything other than equipment or

1 software and certainly not in anything remotely resembling a  
2 stock. We also should note, even though this is not up on  
3 the screen because it would take too many pages, that the  
4 contract repeatedly says, that is approximately 50 times,  
10:09:06 5 that it relates to virtual or cryptocurrencies, that is,  
6 unbacked crypto assets which are called Green Rewards. And  
7 the SEC's complaint agrees at paragraphs 16 through 18 and  
8 45, about the nature of rewards referring to them repeatedly  
9 as ERC-20 tokens.

10:09:29 10 And notably in 2018, the critical year for these  
11 allegations, it is public record that academic experts were  
12 saying that cryptocurrencies such as Bitcoin, Ether,  
13 Litecoin and Bitcoin Cash were not securities. And one of  
14 those experts was MIT professor and now SEC chairman Gary  
10:09:50 15 Gensler. And as we will see shortly, earlier this year the  
16 President's Council of Economic Advisors, part of the  
17 executive branch to which the SEC belongs, concurred with  
18 that 2018 assessment.

19 The court need go no further. Read in context of  
10:10:08 20 *McGill and Howey*, the contract does the work. Without a  
21 common enterprise, there can be no security. And in the  
22 absence of a security, the SEC is simply out-of-court, and  
23 we need not concern ourselves with heated allegations of  
24 missing blockchains or phantom mining which we're forced to  
10:10:27 25 accept at this juncture. They make for an interesting

1 story. But in the absence of a security, they're  
2 irrelevant.

3 Now, for there to be a securities fraud, all  
4 three of the *Howey* elements for investment contract must be  
10:10:40 5 satisfied. And to recap, there must be an investment of  
6 money, in a common enterprise, with profits to be secured  
7 solely from the efforts of others. The complaint cannot be  
8 saved by "close enough." Two out of three does not make an  
9 investment contract.

10:10:56 10 So while the SEC briefly salutes all three  
11 elements in paragraph 40 of the complaint, in the SEC's  
12 actual argument there is one element conspicuously missing.  
13 Common enterprise. So one must conclude that the SEC wishes  
14 to read that troublesome factor out of the investment  
10:11:15 15 contract test altogether because it ends its case.

16 So both parties agree that common enterprise is  
17 the pivotal issue here. But the good news is we have very  
18 explicit rulings, both from the Tenth Circuit and Supreme  
19 Court, as well as the blue sky cases in which they're rooted  
10:11:33 20 which makes the decision easy.

21 And we will begin with the key words from the  
22 determinative ruling by the Tenth Circuit in *McGill* which  
23 considered what kind of transaction created a common  
24 enterprise giving rise to a security falling within the  
10:11:50 25 Exchange Act. And as the court can see, *McGill* said, "a

1 transaction is in reality an investment. That is, a  
2 transaction of a type in which stock is often given. In its  
3 brief in opposition, pardon me, Your Honor, the SEC left out  
4 those 13 words in the parenthetical in its description of  
10:12:11 5 *McGill*. Perhaps they will tell us why, especially since  
6 they don't challenge *McGill* or its reasoning. But what is  
7 even harder to fathom, indeed what certainly seems to have  
8 been a startling omission, is when the SEC also failed to  
9 mention the *McGill* court's further description of the issue  
10:12:31 10 which we will now bring up. That is, "Mr. McGill purchased  
11 the right to participate in the joint venture's operating  
12 profits, not merely the right to enjoy capital appreciation  
13 on tangible assets. The transaction was simply an  
14 investment by *McGill* of money in an ongoing business with  
15 the expectation that he would receive profits if the joint  
16 venture's operations were successful."

17 Frankly, if one accepts the three part test of  
18 *Howey* and *McGill*, we need not go any further because these  
19 two factors are not pled in the complaint nor do they appear  
10:13:05 20 in the contract.

21 So faced with that, the SEC tries to change it  
22 again by converting *Howey* and *McGill* into a two part test  
23 focusing on what an investment is and relying on wording  
24 about the breadth of the congress' catchall language in  
10:13:22 25 passing the Securities Acts. We can see this most clearly

1       in page 11 of its brief where the SEC states plainly, I'm  
2       quoting now, "In the Tenth Circuit, all that is required"  
3       and I'll repeat that, "all that is required, is that the  
4       complaint allege an investment scheme advertised as an  
10:13:41 5       opportunity for profit."

6               But that is not what *McGill* says. Mr. McGill did  
7       not invest in a scheme, he invested in an ongoing business  
8       in which he would receive a share of the businesses  
9       operating profits. And the *McGill* opinion says quite  
10:13:56 10       explicitly that an investment for these purposes is quote,  
11       " a transaction of the type in which stock is often given.  
12       All we need do is abide by those words, the words the SEC  
13       wishes this court to ignore."

14               In subsequent years, the Tenth Circuit maintained  
10:14:15 15       the importance of the same elements. For example, in *McVay*  
16       versus *White Plains*, the court there found that instruments  
17       were not securities because they lacked, quote, "the basic  
18       attributes of true stock," including the right to, quote,  
19       "receive dividends," close quotes, or quote, "apportionment  
10:14:34 20       of profits of a business enterprise." Again, the words of  
21       *McGill* are vital and continue to be vital both in *McVay* and  
22       in subsequent cases.

23               In fact, such an attempt to subsume the second  
24       element of the *Howey* test into the third, and compress those  
10:14:54 25       together into something that it is not, has never been

1 accepted by the Tenth Circuit or by the Supreme Court. But  
2 the SEC and the Tenth Circuit have made it easy for us. In  
3 the absence of an argument that *McGill* was wrongly decided,  
4 all we need do is follow its words. The SEC's investment  
10:15:13 5 for profit opportunity argument, on the other hand, is more  
6 than a novel theory or a modification. It would be a  
7 radical departure, in fact it would be an elimination of the  
8 common enterprise element of *Howey*. In essence, without  
9 saying so, at least directly, the SEC asked this court to  
10:15:32 10 overrule both *McGill* and *Howey*.

11 In fact, the SEC says so on its own website. On  
12 Page 25 of the SEC's brief it cites to its 2019 Framework  
13 For Investment Contract Analysis of Digital-Assets as  
14 appropriate, I'm now quoting, "guidance on the application  
10:15:54 15 of *Howey* to the sale of crypto assets," close quote.

16 Upon close examination, that turns out indeed to  
17 be a rather remarkable document. And we see it up before us  
18 now. At least we see the relevant footnote as it relates to  
19 the *Howey* test which is footnote 10. That footnote, as the  
10:16:13 20 court can see, addresses the *Howey* test directly and then  
21 states quite plainly, that the SEC doesn't consider common  
22 enterprise to be a distinct element of an investment  
23 contract. That is an extraordinary claim. And for  
24 authority, it relies on an order in an administrative  
10:16:34 25 matter, *SEC versus Barkate*, conducted by what we now know to

1       be an unconstitutionally appointed administrative law judge  
2       in which the order itself was an affirmance of an NASD  
3       disciplinary proceeding.

4                   And it does not cite to a case. Rather, it cites  
10:16:50 5       to one of its own briefs in the *Edwards* case. Thus, while  
6       *Barkate* may lack the usual pedigree, it is serious business  
7       indeed but it constitutes an administrative end run around  
8       the law.

9                   Footnote 10 of the framework may be the perfect  
10:17:09 10      display of regulatory overreach with the administrative stay  
11       elevating itself above both the legislative and the judicial  
12       branches. But that aside, Footnote 10 makes one thing  
13       plain. The SEC's argument is not that they can meet the  
14       common enterprise test, their argument is that they can  
10:17:30 15      ignore it.

16                   Even more, the SEC's desire to eliminate common  
17       enterprise from the *Howey* test underscores the fact that  
18       this is a legal issue and now is the time to address it.  
19       And let's consider, Your Honor, for a moment, the  
10:17:44 20      consequences if the SEC's untethered theory were to be  
21       accepted. The SEC cannot cast its net wide enough as to  
22       capture Green Rewards without capturing many other things  
23       from which a profit may be made due to the efforts of  
24       others.

10:18:02 25      Let's just think about two examples. Let's take

1 Utah Jazz season tickets. And let's say I wish to buy them  
2 and perhaps I would like to resale them and I would expect  
3 to make a profit. And the Jazz would use those proceeds  
4 from me, and the proceeds from other season ticket holders,  
10:18:22 5 to draft player talent, to hire coaches, to improve  
6 facilities, all which will make the tickets more valuable so  
7 I might be able to make even more money by reselling them  
8 again. But one thing I would not get, by buying season  
9 tickets, is an unrestricted ownership interest in the Jazz.

10:18:41 10 And one of the common sense consequences of that,  
11 if you think about it for a moment, if I hold such tickets,  
12 should I register them? I have been -- I have bought the  
13 tickets, I am holding them for profit, it was and it's the  
14 efforts of others that are going to generate that profit,  
10:18:58 15 should the Jazz register those tickets and what exactly  
16 would be registered?

17 If I resell them for a profit, does that make  
18 them securities and should the jazz therefore bar ticket  
19 resales? Or take another example. Posit a company which  
10:19:16 20 owns a large portion of the world market of a rare earth  
21 metal. That metal has modest uses today, but the company  
22 believes it could be used to create revolutionary microchips  
23 which support advances in AI. And that is not really Star  
24 Wars stuff because that is exactly what the Nvidia company  
10:19:34 25 has done. So the company sales lots of the metal and uses

1 the proceeds of those sales in an effort to support its R&D  
2 and develop the new microchips. The buyers of the metal  
3 would have one, a reasonable expectation; of two, obtaining  
4 a future profit based on; three, the managerial and  
10:19:54 5 entrepreneurial efforts of the company. But all they own is  
6 a chunk of metal. They don't own a share of the company.  
7 How could that metal amount to a security? How would it be  
8 registered? Could it be sold to anyone else without  
9 registration? If not, how would the buyer comply with  
10:20:09 10 regulation SK which you have to comply with in order to file  
11 a registration statement.

12 So under the SEC's test of we only have to allege  
13 an investment with an expectation of profits, all of these  
14 would be securities. And so would other investments like  
10:20:25 15 baseball cards, art, antiques, coin collections, that  
16 particular type of thing. And we all know, as just a simple  
17 application of common sense, those are not securities and  
18 they were never intended to be securities.

19 But let's say I decided I am going to invest in  
20 baseball cards and I think there is going to be a great  
21 market for those cards and they're going to go up in value  
22 because I'm going to get an early 1950s Mickey Mantle card.  
23 And as it turns out, that is a fake card that I bought. I  
24 should have a remedy for that. But is that remedy a  
10:21:03 25 securities fraud remedy or is that remedy a consumer remedy

1 or remedy where I should go to the courts of the State of  
2 Utah and ask them to apply the common law of the statutory  
3 law.

4 Obviously, these kinds of things would be a  
10:21:19 5 radical change from current practice as well as a massive  
6 expansion of the SEC's jurisdiction and power. Common sense  
7 and decades of experience say otherwise. And it also ties  
8 us back to *McGill* which teaches that an investment contract  
9 means more than a simple appreciation on tangible assets  
10 exactly as the court said.

11 Applying these same common sense concepts, why  
12 should we expect that Green United would bring a Green Box  
13 or a Green Node and register it with the SEC? And that is  
14 why we believe defendants will prevail.

10:21:55 15 THE COURT: What does the Green Box do?

16 MR. GANNON: Your Honor, it is a -- a Green Box  
17 is essentially a computer with software in it that is an  
18 algorithm. You plug it in and it mines cryptocurrencies  
19 including Bitcoin.

20 THE COURT: Can you buy the Green Box without the  
21 algorithm?

22 MR. GANNON: You could.

23 THE COURT: With the software or are they a  
24 combination?

25 MR. GANNON: It's a combination.

1 THE COURT: Okay. What does the Green Box do?

2 MR. GANNON: The Green Box is plugged in and it  
3 mines cryptocurrencies. In most cases, it mines Bitcoin.  
4 It can mine other things.

10:22:29 5 THE COURT: I don't know what "mine" is.

6 MR. GANNON: That's a great.

7 THE COURT: These use "mine" in a different sense  
8 than the word "mine" I grew up with.

9 MR. GANNON: Yes, and we're going to talk about  
10 the mining term in a moment, Your Honor. But what it does  
11 is when it is plugged into whatever the network is that has  
12 a digital coin that wishes to be mined, it solves a -- it  
13 goes through something called a "proof of work" scenario and  
14 it solves an algorithmic problem or attempts to solve it and  
15 if it wins, if it does solve that problem, then it is  
16 rewarded with, in this case, a reward of bitcoin.

17 THE COURT: Is it a gambling device?

18 MR. GANNON: I'm sorry, say again?

19 THE COURT: Is it a gambling device?

10:23:13 20 MR. GANNON: No, sir, it is not.

21 THE COURT: My reward is what?

22 MR. GANNON: Your reward in this case would be it  
23 either could be A, bitcoin, and some of these miners were  
24 sold specifically to mine bitcoin; or it could be something  
10:23:28 25 called a Green Reward which has another use. Think of it as

1 -- the easiest thing maybe, Your Honor, is to think of it as  
2 Delta miles.

3 THE COURT: Well, what is it? A Green Reward is  
4 just a couple of words.

10:23:41 5 MR. GANNON: Well, it is, but it is actually a  
6 thing that people actually have in their possession.

7 THE COURT: But it refers to something and I am  
8 interested in what it refers to.

9 MR. GANNON: Uh-huh (affirmative). Well, what it  
10 refers to, Your Honor, is I guess there are two ends of it.

11 Number one, a Green Reward refers to the process by which it  
12 was created; and then a Green Reward assuming that it has  
13 been created and I own a Green Reward, then it refers to  
14 what I can use that Green Reward for.

10:24:10 15 THE COURT: What can you use it for?

16 MR. GANNON: According to the amicus, you can use  
17 it essentially as a cryptocurrency much like a bitcoin.

18 THE COURT: I don't know what that is. What --  
19 how --

10:24:21 20 MR. GANNON: You can use it to -- you can use it  
21 to trade for other entities on a blockchain.

22 THE COURT: With whom?

23 MR. GANNON: I'm sorry, sir.

24 THE COURT: Trade with whom?

10:24:31 25 MR. GANNON: Trade with other owner's of

1 digital-assets. So...

2 THE COURT: Bitcoins?

3 MR. GANNON: Could be bitcoins, could be Ether,  
4 could be Litecoin, could be Solana. There are -- there are  
10:24:43 5 literally hundreds of other digital-assets that are traded  
6 on what is called "on-chain."

7 THE COURT: Well, what good are they? What good  
8 are they? What could you use them for?

9 MR. GANNON: Well, you could use them for a  
10 variety of things. Number one, you could use them to build  
11 projects. So you can build other projects. They are --  
12 they are what are called open source software and therefore  
13 they can be used and developed to do other things. Ethereum  
14 does that all of the time. Or, they can be converted to  
10:25:12 15 fiat currency and used to buy goods just like we buy a cup  
16 of coffee or a sandwich.

17 THE COURT: I exchange a United States issued --

18 MR. GANNON: Yes.

19 THE COURT: -- bill or coin. And if I take it to  
10:25:31 20 the United States, I could turn it in and get credit of some  
21 kind.

22 MR. GANNON: Yes.

23 THE COURT: I don't understand what they're  
24 buying if there is no common market or no guarantee.

10:25:50 25 MR. GANNON: Well, there is -- it is definitely

1 not backed by the full faith and credit of the United  
2 States. No question about that.

3 THE COURT: Well, it isn't. And that's  
4 interesting to me as a student in that area, but --

10:26:03 5 MR. GANNON: Correct.

6 THE COURT: -- I am trying to describe or have  
7 someone describe for me, educate the court, in effect --

8 MR. GANNON: Yes.

9 THE COURT: -- what is it you're selling? What  
10:26:17 10 is it that you're actually selling. Can you buy the  
11 software separate?

12 MR. GANNON: You could, in theory. But I can  
13 tell you -- I can tell you what Green United was selling,  
14 Your Honor. What Green United was selling was A, equipment  
10:26:37 15 that came with software, that was the Green Boxes; and B,  
16 they were selling software, which are the Green Nodes.

17 And those two things enabled the purchasers, if  
18 they chose, to acquire Green Rewards as a result of their  
19 actions. They actually had to run the miners and they had  
10:26:57 20 to run the nodes. So as a result of their actions, they  
21 could acquire Green Rewards.

22 THE COURT: Where do you get those?

23 MR. GANNON: I'm sorry, sir?

24 THE COURT: Where do they use the Green Rewards?

10:27:07 25 MR. GANNON: When can they?

1 THE COURT: Where? Where?

2 MR. GANNON: Where. They can be --

3 THE COURT: Who accepts them?

4 MR. GANNON: They can be exchanged for fiat and  
10:27:15 5 can be used anywhere.

6 THE COURT: Well, fiat is just private money.

7 MR. GANNON: Correct.

8 THE COURT: So what?

9 MR. GANNON: Well, they can be used to buy goods  
10:27:25 10 and services. And they also --

11 THE COURT: How could they be used to buy goods  
12 and services?

13 MR. GANNON: Because there is a market out there  
14 where people will exchange crypto assets for goods. They  
10:27:36 15 hold the crypto assets and they later exchange them for fiat  
16 just like any merchant would. And they can be turned in for  
17 other benefits much like, for example, if you use your Delta  
18 card to fly to Atlanta you can get rewards.

19 THE COURT: Is it exchanged for U.S. money?

10:27:53 20 MR. GANNON: Oh, they can be and they are all of  
21 the time.

22 THE COURT: And where is that? Where is that  
23 done?

24 MR. GANNON: At a merchant who -- who will give  
10:28:02 25 you goods and services that are denominated in U.S. dollars

1 and you can do one of two things. You can either A, take  
2 for example there are -- there are ATMs where you can  
3 actually put in a card, that card will -- knows how much  
4 bitcoin you have on that card, and it will give you U.S.  
10:28:22 5 dollars. So there are certain banks that participate in the  
6 exchange of digital assets for U.S. dollars.

7 THE COURT: Okay. I'm still waiting for somebody  
8 to educate me as to what the machine actually does, the blue  
9 box -- the green box.

10:28:42 10 MR. GANNON: Your Honor, I will be happy to keep  
11 trying if I'm not getting it right.

12 THE COURT: I think I specific -- a specific  
13 description of the machine and a specific description of the  
14 software would be helpful to me. I don't want to just deal  
10:29:08 15 with words. I am interested in an accurate description of  
16 what we're talking about.

17 MR. GANNON: Well, Your Honor, let me try this.  
18 I'll try another -- I'll try another description and sort of  
19 take it from beginning to end. And then if Your Honor would  
10:29:25 20 like, we would be happy to supplement that with a  
21 memorandum. But, what the machine does is, it is a -- it is  
22 a computer and the purpose of that computer is to solve a  
23 particular algorithmic problem that allows --

24 THE COURT: What problem and where does that come  
10:29:42 25 from?

1 MR. GANNON: In the case of bitcoin, it comes  
2 from --

3 THE COURT: No, in the case of the Green Box?

4 MR. GANNON: Where does the Green Box come from?

10:29:50 5 THE COURT: Yeah. You say it solves an  
6 algorithm, I want to know where the algorithm comes from.

7 MR. GANNON: Yes. The algorithm comes from the  
8 bitcoin community. Bitcoin is a -- is a decentralized  
9 community that in order to generate more bitcoin, there has  
10 to be an algorithm, a very difficult math problem that is  
11 solved. And those math problems are spit out about once  
12 every ten minutes.

13 There is a competition. And by the way, Your  
14 Honor, ten years ago I would have found this a little bit  
15 difficult to imagine as well. There is literally a  
16 worldwide competition that goes on, and the people who are  
17 in that competition attempt to solve that math problem. If  
18 they do solve that math problem, they are rewarded with  
19 bitcoin.

10:30:38 20 THE COURT: Okay. Where does the math problem  
21 come from?

22 MR. GANNON: From the bitcoin community.

23 THE COURT: And what if I don't want to work with  
24 bitcoin, do I have a backup?

10:30:47 25 MR. GANNON: Sure you can. There are other

1       bitcoin -- the solving of the math problem is something  
2       called "proof of work." But if you wanted to say engage in  
3       another community, we'll call it the Ethereum community  
4       which has a lower cost of energy, you would -- you would say  
10:31:05 5       that you want to become -- you want to own a node and what  
6       the node does is it validates the transactions that appear  
7       on the blockchain ledger.

8                   And as a result of being willing to have your  
9       node be part of that overall community that validates the  
10       transactions, you are rewarded for that as well. In this  
11       case, when I said Ethereum and in that case you would be  
12       awarded with Ethereum.

13                   THE COURT: I get a Green Reward and how do I use  
14       it.

10:31:35 15                   MR. GANNON: Well, you can use it for several  
16       things, Your Honor. You can exchange it. Let's say you  
17       have a Green Reward. You don't have any particular, you  
18       think, any use for the Green Reward at the moment, but you  
19       would like to get some Ethereum. You can simply go on a  
20       market, and it's a digital exchange, a decentralized  
21       exchange called Uniswap. And you can exchange --

22                   THE COURT: Where is that located?

23                   MR. GANNON: Say again?

24                   THE COURT: Where is that located?

10:32:00 25                   MR. GANNON: Uniswap is not located anywhere,

1 Your Honor. It is located literally on a series of  
2 computers all over the world. Uniswap is a decentralized  
3 exchange and you interact --

4 THE COURT: You're talking to a machine.

10:32:14 5 MR. GANNON: You do interact virtually with  
6 Uniswap, that's correct.

7 THE COURT: And you're talking to a machine?

8 MR. GANNON: You are depositing your, in this  
9 case, Green Rewards with Uniswap, and in exchange you can  
10 get Ethereum. And so, if you want Ethereum, Green Rewards  
11 is one way to -- is one way to get it. That's one way.

12 THE COURT: What's Ethereum.

13 MR. GANNON: Ethereum is another digital-asset,  
14 Your Honor.

10:32:40 15 THE COURT: Such as?

16 MR. GANNON: It would be similar to bitcoin in  
17 the sense that it can be used as essentially a substitute  
18 for money. It's a different kind of money, much like  
19 bitcoin.

10:32:54 20 THE COURT: That depends entirely on the  
21 willingness of people to participate.

22 MR. GANNON: Yes, 100 percent. 100 percent.  
23 Bitcoin, for example, speaking of willingness of people,  
24 bitcoin in 2009 had a value of less than a penny. I think  
10:33:09 25 the -- I think the first person who bought anything with

1       bitcoin bought a couple of pieces and they bought it for  
2       several hundred bitcoin. That would be worth many, many  
3       thousands, hundreds of thousands of dollars today.

4                   THE COURT: If somebody is willing to pay that.

10:33:23 5                   MR. GANNON: If somebody is willing to pay it.

6       And today, we can go on -- we could Google bitcoin right now  
7       and find out what its price is. And the last time I looked,  
8       a few days ago, it was \$26,000 for one bitcoin. So it went  
9       from less than a penny in 2009 to \$26,000 today.

10:33:41 10               Now why --

11                   THE COURT: A market function.

12               MR. GANNON: Correct. It was market demand.  
13       There was global demand for a crypto or virtual asset, such  
14       as bitcoin, in order to be used as a substitute for money  
15       and for other purposes as well.

16                   THE COURT: Okay. You go ahead. Finish your  
17       argument.

18               MR. GANNON: Certainly, judge. So we were  
19       talking about, Your Honor, before we entered into that  
10:34:14 20       colloquy, about the examples of things that could be  
21       securities but aren't securities. And we believe that's why  
22       we prevail. Because like the buyers of Jazz tickets and  
23       rare metal, buyers of Green Nodes and Green Boxes didn't get  
24       any ownership interest in Green United, nor has the SEC  
10:34:35 25       alleged that they did. And if there was any remaining

1 doubt, the executive branch added some needed clarity as to  
2 the differences between digital-assets and securities which  
3 apply directly to our situation.

4 And given our colloquy, Your Honor, this might be  
10:34:50 5 -- this might be of interest. So the report employs  
6 language consistent with that used by the Tenth Circuit and  
7 the Supreme Court in the President's March 2023 Economic  
8 Report to Congress. And it describes in a clear manner the  
9 differences between digital-assets and stocks.

10:35:11 10 And it says, "one reason many crypto assets are  
11 highly volatile, is that many of them do not have a  
12 fundamental value. For example, stocks are claims on the  
13 future profits of firms, and debt is a claim on interest and  
14 principal payments. Even commodities such as gold and  
10:35:27 15 silver have fundamental values because they can be used in  
16 jewelry and for special manufacturing purposes. Conversely,  
17 unbacked crypto assets," and I'll pause there, much like we  
18 were just talking about, Your Honor, "are traded without  
19 fundamental anchors suggesting that their market prices only  
10:35:45 20 reflect speculative demand or market sentiment, not claims  
21 on cash flow."

22 And here, in the complaint, Your Honor, the SEC  
23 alleges at Paragraph 28 in essence that Green is an unbacked  
24 crypto asset which has no value unless it can be traded on  
10:36:03 25 the secondary market. And they repeatedly acknowledge that

1 Green often takes the form of an ERC-20 token which is the  
2 classic unbacked crypto asset. And the contract says the  
3 same thing, if we could bring up the next slide, in which  
4 the contract discusses market risk and says specifically  
10:36:25 5 that Green cannot guarantee or warrant the value of any  
6 crypto currency or blockchain, including the Green  
7 blockchain and Green Reward, and explicitly warns the user  
8 that there is no reason to believe that any cryptocurrency  
9 or blockchain reward will increase in value, and that they  
10:36:42 10 may hold no value, decrease in value, or entirely lose  
11 value.

12 So *McGill*, the President's Economic Report and  
13 the contract are completely consistent. Whatever term we  
14 wish to use to describe Green Rewards, the economic reality  
10:36:57 15 is they have no claims on cash flow, they cannot be  
16 understood to be like a stock, to be like a debt instrument,  
17 or to be like a commodity. And as it happens, the Supreme  
18 Court and the Tenth Circuit are on the same page regarding  
19 this fundamental economic reality. In the very same year as  
10:37:15 20 *McGill*, in *Landreth Timber*, the Supreme Court identified the  
21 primary characteristics of a stock is the right to receive  
22 dividends contingent upon an apportionment of profits.

23 And I would say, Your Honor, that that in a lot  
24 of ways is reflective of the line of inquiry that you were  
10:37:35 25 just going down. It is true these are unbacked virtual

1 assets that people own and they wish to use them for their  
2 own purposes. But what they don't give anybody who owns a  
3 digital-asset is a claim back against the source of that  
4 asset where they purchased it from just like the President's  
10:37:56 5 Economic Report says.

6 So while it may seem unusual, and it may seem a  
7 lot of work to understand exactly what they are, it's not so  
8 much work to understand that they're not a security.  
9 Because again, no claim on profits, no claim on interest or  
10:38:15 10 principal payments, and no uses like a commodity.

11 THE COURT: And if there is no market, then  
12 they're worthless.

13 MR. GANNON: Correct. Correct. So what is also  
14 notable about *McGill*, to continue that discussion, is how  
10:38:30 15 consistent it is with respect to the major common enterprise  
16 cases from 1920 until now. Like *Howey* itself, and all the  
17 blue sky cases in which *Howey* is rooted, and in all of its  
18 progeny, including all of the Supreme Court cases, the  
19 court's find that common enterprise exist when and only when  
10:38:49 20 an investor places funds in an underlying enterprise and has  
21 a contractual right to share in the future profits, however  
22 we want to define those, whether they're revenue sharing,  
23 dividends, fixed returns, whatever, of that enterprise.

24 And that, of course, is missing here. Now we  
10:39:06 25 reviewed the key blue sky cases at page seven of our opening

1 brief and the SEC did not challenge their applicability, but  
2 they were most recently comprehensively analyzed in an  
3 amicus brief in a matter in which the SEC is the plaintiff,  
4 the *Coinbase* matter, by six leading securities law  
10:39:25 5 professors. And we have, Your Honor, if we may, we have  
6 copies of that amicus brief for both the court and for the  
7 SEC. Would Your Honor like us to --

8 THE COURT: And the brief is submitted where?

9 MR. GANNON: The brief was submitted in the  
10 *Coinbase* matter which is currently pending in the Southern  
11 District of New York, Your Honor.

12 THE COURT: Well, I'm happy to receive whatever  
13 you want to submit.

14 MR. GANNON: Sure. Thank you, Your Honor. The  
15 brief concludes, and this is not surprising, that there must  
16 be a contract giving the buyer a claim on the future profits  
17 of the enterprise in order for there to be a common  
18 enterprise. And in one of the earliest cases, maybe the  
19 earliest case to discuss a common enterprise, maybe almost  
20 ever, it is a 1920-case out of Minnesota called *Gopher Tire*,  
21 and it is cited in the *Howey* case.

22 The Minnesota Supreme Court noted that the  
23 certificates issued by a local tire dealer to its investors  
24 had the same key features as stocks. The investors provided  
10:40:53 25 capital to the dealer and in return the investors obtained

1 by contract the right to share in the profits of the Gopher  
2 Tire Corporation.

3 So the consistency of the common enterprise test  
4 is both unbroken and extends through the Supreme Court's  
10:41:10 5 jurisprudence on common enterprise. For example, comma, for  
6 example, in *Tcherepin versus Knight*, sorry, I mispronounced  
7 that, Your Honor, *Tcherepin versus Knight*, which is relied  
8 on by the *McGill* court, the purchasers bought withdrawable  
9 capital shares in an Illinois Savings and Loan called City  
10:41:33 10 Savings. The holders of those shares received dividends  
11 declared by the association's Board of Directors and based  
12 on the association's profits and they could expect a return  
13 on their investment only if City Savings showed a profit.

14 Clearly then, and I'm now quoting the court, "the  
10:41:50 15 petitioner's withdrawable capital shares have the essential  
16 attributes of an investment contract as that term was  
17 defined in *Howey*." So given the lynchpin importance of  
18 common enterprise, if the Tenth Circuit or the Supreme Court  
19 were to reverse, or even slightly modify their views by  
10:42:07 20 expanding the meaning of common enterprise, they would have  
21 said so plainly. They have not and courts do not hide  
22 elephants in mouse holes.

23 The consistency of the Tenth Circuit and the  
24 Supreme Court with respect to common enterprise is both  
10:42:22 25 telling, it is reliable, and it has been unwaivering. Stare

1       decisis has its place in this jurisdiction and we simply  
2       should stand by those things that have been decided and  
3       after many chances have not been changed.

4                         Now, the SEC disagrees, but with no comfort to be  
10:42:39 5       found in the controlling tests, it focuses on statements  
6       from any number of sources standing for the well known but  
7       unremarkable proposition that the securities laws are broad  
8       and flexible in scope and were intended by congress to  
9       capture all of the variable schemes which may be devised by  
10:42:56 10      unscrupulous promoters.

11                       Defendants, of course, don't take issue with that  
12       proposition. Indeed, that's why the investment contract  
13       test was developed in the blue sky cases. So as to avoid  
14       the limitations, however, for the -- on the common  
10:43:10 15      enterprise element, the SEC argues for a boundless  
16       interpretation of *Howey*. However, *McGill* says otherwise  
17       cautioning us that, quote, "the *Howey* doctrine does not go  
18       completely across the board and pick up everything that does  
19       not comply with its view of the situation." And as the  
10:43:28 20      Supreme Court observed in *Marine Bank*, even the congresses  
21       broad catchall language is of no moment unless a security is  
22       involved. Rapid descriptive technology, standing alone, is  
23       no substitute for analysis.

24                       In short, the laws that relate to common  
10:43:47 25      enterprise is time tested and consistent. The SEC on the

1 other hand has played with what I would called the five  
2 inconsistencies. This argument is inconsistent with the  
3 blue sky laws, with the Tenth Circuit, with the Supreme  
4 Court, with the economic reality as seen in the President's  
10:44:03 5 Economic Report and with common sense. So we can return  
6 essentially to home base.

7 Here, there was no offer or promise of ownership  
8 in Green United. There were no returns from Green United or  
9 a share of its operating profits. Nor did the equipment  
10:44:19 10 purchasers secure any rights at all with respect to Green  
11 United other than for delivery of the equipment.

12 So in the end, the result is simple. *McGill*  
13 requires that the investment contract resemble a stock, a  
14 right to secure an ownership share in the operating profits  
10:44:37 15 of the enterprise. The Supreme Court is in full agreement  
16 and those characteristics have not and cannot be pled. And  
17 there is no common enterprise, there was no investment  
18 contract, and there is no security. And this case must be  
19 dismissed with prejudice.

10:44:55 20 And while I will now move on to a discussion of  
21 the SEC's fraud allegations. Obviously, the court need not,  
22 in fact cannot, reach that issue or subsequent ones, if  
23 there is no security.

24 So now to discuss fraud and those allegations in  
10:45:11 25 the complaint. What we simply ask here, Your Honor, is

1 adherence to Federal Rules of Civil Procedure 9(b). And  
2 that was stated perhaps best in *MacArthur versus San Juan*  
3 *County*. To quote, "simply stated, a complaint must set  
4 forth the time, place, and contents of making the false  
10:45:32 5 representation, the identity of the party making the false  
6 representation, and the consequences thereof. And at a  
7 minimum, Rule 9(b) requires that a plaintiff set forth the  
8 who, what, when, where, and how of the alleged fraud."

9 The complaint here does none of those things. It  
10:45:50 10 alleges in paragraph 26 only one statement by Wright  
11 Thurston and it contends that that statement is true.  
12 Notably, there are no allegations even that Mr. Thurston  
13 made any money from his alleged actions. Perhaps  
14 recognizing these flaws, the SEC avoids any claim that  
10:46:09 15 Mr. Thurston made a misstatement which would subject him to  
16 liability under Rule 10b-5(b). So lacking the usual support  
17 for fraud, the commission falls back on scheme or course of  
18 conduct liability under Rules 10b-5(a) and (c). But for a  
19 scheme to exist, there must be some form of manipulation or  
10:46:29 20 deceit and the SEC's allegations fail to support any form of  
21 fraud with Mr. Thurston and particularly with the  
22 particularity required. For example, the SEC alleges that  
23 in its complaint in paragraph 10, that Mr. Thurston founded  
24 Green United. But founding a start up is not manipulative  
10:46:49 25 or deceitful. In the same paragraph it says, "Mr. Thurston

1 had partial control over the relief defendants." But the  
2 relief defendants are not alleged to have done anything  
3 wrong. Nor is there any allegation that Mr. Thurston had  
4 any control over Green United or over Mr. Krohn. There is  
10:47:06 5 an allegation that Mr. Thurston told purchasers of the  
6 equipment that we will do it all for you. But that was not  
7 false, nor is it alleged to be false, nor is it deceitful.  
8 The SEC does not allege that if a customer took its Green  
9 Box home, it would not have gotten any Green Rewards. In  
10:47:24 10 fact, Green Nodes are operated from home and the SEC  
11 acknowledges they do generate Green Rewards.

12 There is also an allegation that Mr. Thurston  
13 directed the distribution of Green Rewards. But that is  
14 exactly what the purchasers bargained for. And as to  
10:47:40 15 everything else related to Mr. Thurston, the allegations are  
16 conclusory, they're collective, or they're made on  
17 information and belief. For example, allegations of fraud  
18 in paragraph 35 regarding Green Nodes are made on  
19 information and belief.

10:47:54 20 In paragraph 45, the allegations -- the  
21 allegation is that Green Rewards were deployed on the  
22 Ethereum blockchain under Mr. Thurston's direction but  
23 nothing about how he did so, with whom he communicated, or  
24 anything about the consequences other than customers got  
10:48:10 25 what they bargained for. And all of these conclusory

1       allegations violate the standards set forth in *Coastal*  
2       *Health Care and Warnock*, from this circuit, that a complaint  
3       must make clear exactly who was alleged to have done what to  
4       whom as distinguished from collective allegations. And it  
10:48:28 5       violates, as well, the standard in *Caprin* that each  
6       actionable misstatement should be described.

7               Piling one conclusory allegation on top of  
8       another falls well short of providing the required  
9       specificity under Rule 9(b). And that such laps exist after  
10:48:44 10      four and a half years of investigation defies explanation.  
11       Government enforcement agencies, particularly those who can  
12       issue subpoenas, are powerful instruments. It is not too  
13       much to ask that in exchange for the exercise of that power  
14       they be required to state allegations of fraud with  
10:49:00 15      provision -- with precision, and they have not done so with  
16       respect to Mr. Thurston.

17               Remarkably, the SEC also basis its fraud  
18       allegations in part on information and belief, not on the  
19       contention that Green United customers failed to receive  
10:49:17 20      Green Rewards but rather on the fact that they did receive  
21       them because Mr. Thurston directed so by making changes to  
22       the Green Smart contract which was connected to the Ethereum  
23       blockchain. And here we go with Ethereum again.

24               In other words, Mr. Thurston somehow committed  
10:49:35 25      fraud by ensuring that Green United customers received the

1 Green Rewards for which they bargained.

2 And now we come to mining, judge. The SEC also  
3 makes the semantic argument that Green Rewards were not  
4 mined, but then it fails to define mining and we can see  
10:49:52 5 that in the complaint, paragraph 18, other than to say, in  
6 its brief at page one, that to mine means to obtain as  
7 financial returns.

8 Other than that, paragraph 18 of the complaint  
9 only tells us that certain crypto assets used the process of  
10:50:11 10 mining. Exactly what that means is left to our imagination.  
11 And I can't use my imagination to rebut an allegation of  
12 fraud.

13 But, of course, Green Rewards as we just  
14 discussed, Your Honor, actually do exist. Now, whether they  
10:50:27 15 have all the utility that we would like at the moment or  
16 they might have in the future, that's open to a discussion,  
17 although the amici say they have got plenty of use and that  
18 they're happy with them.

19 As the SEC concedes, they are on the Ethereum  
10:50:44 20 blockchain. Indeed, the publicly available ledger for that  
21 Ethereum blockchain, something called Ether scan, shows  
22 there literally have been hundreds of thousands of  
23 transactions with Green Rewards which are generated in  
24 excess of \$25,000,000 in volume, and the amici have informed  
10:51:03 25 the court at paragraph -- at page eight of their brief that

1       Green Rewards are traded and used today in much the same way  
2       as bitcoin.

3                   Again, how that is amounting to fraud is left to  
4       our imagination. The complaint alleges no losses, no  
10:51:19 5       complaints, no financial benefit to Mr. Thurston, no  
6       concealment, no consumer claims of any kind against Green  
7       United or Mr. Thurston. And if this is the classic recipe  
8       for fraud that the SEC says it is, it is missing more than a  
9       few ingredients.

10:51:36 10                   Equally unavailing are the SEC's attempts to  
11       expand Mr. Thurston's liability by placing him in a  
12       presentation where misstatements allegedly were made. But  
13       the commission completely ignores the holding of the Supreme  
14       Court in *Janus* which requires that for securities fraud  
10:51:52 15       allegations to stick, the defendant must be the maker of  
16       those misstatements. And obviously, there are no  
17       allegations whatsoever that Mr. Thurston made a  
18       misstatement.

19                   So in the absence of a duty to speak, there are  
20       allegations that Mr. Thurston was somewhere close to a  
21       misstatement which allegedly was being made by someone else.  
22       But those allegations are not sufficient. Proximity is not  
23       a substitute for duty. So in an effort to avoid these  
24       constraints, the SEC cites *Malouf versus SEC* for the  
10:52:24 25       proposition that one who causes another's misstatements to

1 be disseminated, can be liable under Rule 10b-5(a) and (c).

2 But that case doesn't bring any comfort to the SEC.

3 First, attending a meeting where misstatements  
4 allegedly were made is not disseminating those statements.

10:52:44 5 The complaint never alleges that Mr. Thurston disseminated  
6 the allegedly false statements. Second, Mr. Malouf, the  
7 fellow in -- the fellow in the case cited by the SEC, was a  
8 registered investment advisor and hence he was a fiduciary.

10:53:05 9 He owed at least four different duties from the duty of best  
10 execution to ensuring the accuracy of forms ABD filed by its  
11 firm and he breached all four. Here, there is no allegation  
12 that Mr. Thurston had any duty which required him to speak.

13 And to cite Justice Stevens in his concurrence in  
14 *Chiarella*, before liability civil or criminal may be imposed  
15 for a 10b-5 violation, it is necessary to identify the duty  
16 that the defendant has breached. There is no free-floating  
17 duty to correct others. And in the absence of such a duty,  
18 and its source or allegations thereof, the SEC's efforts to  
19 assert scheme liability against Mr. Thurston fail.

10:53:46 20 But I will say it's notable that the SEC's  
21 efforts here are consistent with its desire to change the  
22 securities laws. They wish to eliminate the common  
23 enterprise factor from the *Howey* test and they also now wish  
24 to add a new all purpose duty to correct going far beyond  
10:54:05 25 any duty recognized by the Supreme Court. They do have an

1 aggressive change agenda, but one that should be addressed  
2 not to this court but to congress.

3 Finally, we don't wish to avoid the complaint's  
4 allegations that my clients are bad actors. Although there  
10:54:23 5 is not much I can do about that now, other than to observe  
6 that the piling up of conclusory invective simply does not  
7 equal securities fraud. But at the same time, it seems  
8 worth observing that when it comes to the conduct described  
9 here, there are ample remedies based in the common law, the  
10:54:41 10 statutory law of Utah, and even federal law involving other  
11 agencies such as the FTC or the CFPB. But as the amici  
12 indicate, and as the search of court dockets demonstrate,  
13 none have been pursued by Green United customers against our  
14 clients. And even though there is a broad array of remedies  
10:55:02 15 available, they're not for securities fraud which would  
16 cause us to reflect on the teachings of the Supreme Court  
17 again in *Marine Bank versus Weaver* that quote, "congress, in  
18 enacting the securities laws, did not intend to provide a  
19 broad federal remedy against all fraud."

10:55:21 20 Indeed, just last week in dismissing a class  
21 action involving the same exchange, decentralized exchange  
22 that I just mentioned, Your Honor, a few moments ago,  
23 Uniswap, Judge Failla, in the Southern District of New York  
24 noted, "the broad remedial goals of the Securities Act are  
10:55:40 25 insufficient justification for interpreting a specific

1 provision more broadly than its language and the statutory  
2 scheme reasonably permit. It's axiomatic that vague,  
3 conclusory, and circular allegations cannot support a charge  
4 of fraud and they don't here. But it is also because they  
10:56:02 5 are -- when they are used to support a government assertion  
6 of liability, that vagueness offends the due process  
7 clause." And I will now turn to that argument, Your Honor.

8 There are two distinct elements to our due  
9 process argument. One, the absence of fair notice; and two,  
10:56:19 10 the presence of arbitrary and capricious rule making. As to  
11 fair notice, it is important to recall that the blockchain  
12 and digital-assets are new technologies, as we just had a  
13 discussion about, and the SEC had nothing to say about them  
14 for the first six or seven years of its existence. That's  
10:56:37 15 not completely surprising because they have technological  
16 underpinnings which are distinct from traditional assets and  
17 therefore they do not fit within an existing regulatory  
18 scheme.

19 So the SEC seems to be making something of a nunc  
10:56:53 20 pro tunc argument. That is you now know what we think of  
21 how the securities law should apply to digital-assets, so  
22 you should have known the same thing back then. But what  
23 they failed to share with the court is the compendium of all  
24 the inconsistencies and confusions injected into the public  
10:57:12 25 record both by them, by other regulators, by the industry

1 leaders and by congress and even some judges. And we  
2 address those in our brief, Your Honor, at pages 27 through  
3 34, and also in our reply brief. And I won't go over them  
4 all now, but there are a couple that are worth noticing.

10:57:28 5 And before we begin that, we also are going to  
6 refer here to again in the *Coinbase* matter another amicus  
7 brief. This was filed by a member of congress, Senator  
8 Cynthia Lummis, who was the sponsor of bipartisan digital  
9 asset legislation.

10:57:41 10 THE COURT: And before we start in on that, let's  
11 take a ten-minute break and then we'll finish and then we'll  
12 hear from the SEC.

13 MR. GANNON: Thank you, judge.

14 (Recess.)

11:09:32 15 MR. GANNON: May it please the court.

16 THE COURT: You may proceed.

17 MR. GANNON: Your Honor, just before our break, I  
18 was about to ask we have already given us other amicus brief  
19 in the *Coinbase* matter to our friends at the SEC, and if you  
20 would accept this, I have a quote from it that I want to  
21 read and then that actually will help me truncate my next  
22 argument and move it along quicker.

23 THE COURT: That would be fine.

24 MR. GANNON: Thank you, judge. So, Your Honor,  
25 we were talking about, pardon me, Your Honor, I'll wait

1 until you have that.

2 So before the break, Your Honor, we were talking  
3 about fair notice and I will be very brief with this, and  
4 also hopefully equally brief with the Major Questions  
11:10:20 5 Doctrine. The fair notice, as I said, is an issue where the  
6 SEC has failed to share with the court the various  
7 inconsistencies and confusions that currently exist about  
8 what the state of digital-assets is and how they should be  
9 regulated. I think to a certain extent the colloquy that  
11:10:40 10 the court and I had several moments ago might reflect some  
11 of the difficulties of that.

12 And as the amicus brief indicates, members of  
13 congress are grappling with this as well. Senator Cynthia  
14 Lummis from Wyoming is the sponsor of a bipartisan piece of  
11:10:58 15 digital-asset legislation which is now moving through  
16 congress. And in the amicus brief she talks about  
17 congress's efforts to grapple with digital-asset  
18 legislation, and she states, without equivocation, and I'm  
19 now quoting, "existing law is inadequate to the task of  
11:11:14 20 addressing crypto assets." And then goes on to say, "the  
21 crypto industry does not fit entirely within the existing  
22 securities laws and transcends the current statutory powers  
23 of the SEC." And, of course, we also see from the  
24 President's Economic Report from earlier this year, that  
11:11:33 25 unbacked crypto assets, like the one at issue here, are not

1 like stock, they're not like debt, and they're not like  
2 commodities.

3 And so really what we ask is the same question  
4 that was posed by Justice Gorsuch earlier this year in  
11:11:47 5 *Bittner versus United States*, "if experts, indeed senior  
6 practitioners at the highest levels of the securities  
7 industry, including those responsible for writing the  
8 securities laws, are experiencing confusion and harboring  
9 doubts today about the SEC's jurisdiction, how in early 2018  
11:12:07 10 could somebody selling computer hardware and software have  
11 known unambiguously, as fair notice requires, that the  
12 securities laws would apply to his sales of hardware and  
13 software." That is a logical question and it is one for  
14 which the SEC has no answer.

11:12:24 15 I'll now take just a moment, before I turn it  
16 over to our friends at the SEC, to discuss the Major  
17 Questions Doctrine. That doctrine exists as a check,  
18 perhaps a bridle --

19 THE COURT: I am familiar with that and we don't  
20 need to really talk about Major Questions. The Constitution  
21 says what it says. The allegation of powers is found in  
22 that fundamental document. People can have a word for an  
23 attitude, but I am really not interested in Major -- so  
24 called Major Question Issue.

11:13:02 25 MR. GANNON: Your Honor, if you're not interested

1 in it, neither am.

2 THE COURT: Congress has indicated it should very  
3 well take an interest in the subject matter.

4 MR. GANNON: Yes, sir. And they -- they have and  
11:13:19 5 if they further develop that interest, we would all be a lot  
6 happier. In conclusion, Your Honor --

7 THE COURT: No just in that particular section.

8 MR. GANNON: Correct. The SEC here, Your Honor,  
9 seeks a change for an investment contract and the investment  
11:13:39 10 contract test that would nullify decades of Tenth Circuit  
11 and Supreme Court jurisprudence and also ignores ongoing  
12 legislative efforts. In essence, it's asking this court to  
13 act as a super legislator. But it does so because it knows  
14 that it cannot meet the test for common enterprise and  
11:13:59 15 therefore it must attempt either to ignore that element or  
16 to argue it out of existence. No court has entertained such  
17 a radical alteration of the fabric of *Howey* or *McGill* and  
18 this court should not begin today.

19 Thank you, judge. I would be happy to answer any  
11:14:14 20 questions or turn it over to my friends at the SEC.

21 THE COURT: No, I'm happy to hear from the SEC.

22 MR. GANNON: Thank you, judge.

23 MR. KRYSA: Just briefly, Your Honor. Thomas  
24 Krysa, again, for Mr. Krohn who is a co-defendant. We just  
11:14:26 25 want to make sure we join for the record the arguments made

1 by counsel for Green United and Thurston. And I don't know  
2 if you can give us five minutes to address the allegations.

3 THE COURT: I will in a few minutes.

4 MR. KRYSA: Okay. Very well, Your Honor. Thank  
11:14:39 5 you.

6 THE COURT: We'll complete what we're doing this  
7 morning.

8 MR. WELSH: Good morning, Your Honor. There are  
9 several points that we would like to address from which  
11:14:56 10 defendant has just stated but first I would like to address  
11 defendant's attempt to reframe what is alleged as the  
12 investment scheme here.

13 This is not just an argument over what the sale  
14 of software, that is not what is alleged. This is a scheme  
11:15:10 15 that starts with first the sale of a software in which, as  
16 Your Honor pointed out, the software was promised to mine,  
17 which I will get into I promise, a crypto asset that they  
18 called Green which was tied to a new innovative blockchain  
19 they were developing called Green Blockchain.

11:15:28 20 Coupled with that sale was a managerial services  
21 and hosting and running the cloud mining software. They  
22 told investors that they had access to cheap power and they  
23 needed -- they had sophistication and the skill and the  
24 know-how to run this special hardware.

11:15:47 25 That is a key point because the software as

1       counsel just said mine bitcoin. It did not mine this Green  
2       crypto asset that they were arguing. The third part of it  
3       was, as promised by the defendants, the crypto asset itself  
4       was tied to this blockchain which would grow in value over  
11:16:07 5       time based on their efforts.

6                   As defense counsel stated, at this point, months  
7       after the complaint was filed, after four years of running  
8       this offering, they still don't have the utility that they  
9       want. And Your Honor pointed out earlier of what the  
11:16:21 10       utility is for this token. There is no utility. There --  
11       unlike the Jazz ticket or precious metals, the primary  
12       purpose of that is consumptive use. People can want to go  
13       to see a Jazz game. Sure some people might want to resale  
14       them. But as the Supreme Court stated in *Forman*, that the  
11:16:41 15       primary purpose is a consumptive use and it is not a  
16       security. That tied to the third prong of *Howey* which I  
17       will get into which is the expectation -- the expectation of  
18       profits based on the efforts of others.

19                   Defendants do not claim that that element was met  
11:16:56 20       -- was not met in the complaint. Additionally, as part of  
21       the scheme is the token and the blockchain did not exist.  
22       So the defendants instead issued an ERC-20 token on the  
23       Ethereum blockchain. Essentially, that is a token that any  
24       person with access to a computer and a YouTube video could  
11:17:18 25       figure out how to create in a couple of hours for a

1 pre-existing -- pre-existing blockchain and then distribute  
2 that out. That is not the Green technology.

3 THE COURT: Tell me what a blockchain is?

4 MR. WELSH: So, Your Honor, the best way to  
11:17:32 5 describe a blockchain is a computer structure in which all  
6 transactions using this type of digital-asset, so we'll say  
7 a computer code, will be transcribed and logged onto the  
8 system. I think a public ledger of sorts, in which it is  
9 immutable and the benefits are claimed to be that when you  
11:17:52 10 look to it you can see and verify when the transaction took  
11 place and the hand-to-hand handshake of the money going from  
12 one location to the other.

13 A simply way of putting it is say similar to an  
14 ACH transfer. There is one sender and one receiver.

11:18:09 15 However, unlike the fiat systems where banking and  
16 intermediaries are there to verify the transactions, the  
17 blockchain itself acts as that mediator. It is a public  
18 ledger and that's where the verification comes through.

19 THE COURT: Is it a common enterprise?

11:18:25 20 MR. WELSH: So I'll back up, Your Honor, to say a  
21 blockchain generally, right, so there is a blockchain --  
22 there is bitcoin blockchain, there is an Ethereum  
23 blockchain, those are for different projects on different  
24 tokens, here what is alleged is a Green blockchain. It is  
11:18:42 25 not a common enterprise as it didn't exist.

1 THE COURT: What does it do?

2 MR. WELSH: It was claimed to run at lower powers  
3 and to be an efficient blockchain that would not take up as  
4 much energy.

11:18:54 5 THE COURT: But what does it do? What's the  
6 product?

7 MR. WELSH: So the product is the token. Your  
8 Honor, you hit the nail on the head with that. What the  
9 actual product does is that users receive the token, hold  
11:19:07 10 onto it, hope that the founders create more demand in the  
11 token. The price goes up and they can resell it for profit.

12 So it's -- if there is no market, as Your Honor  
13 pointed out, it will continue to be worthless. If the  
14 founders like here defendants said that they got onto  
11:19:29 15 exchanges and created a market, a secondary market for  
16 trading, the price would go up. So until the founders  
17 create -- are able to successfully list the token on an  
18 exchange or find a market for it or drive demand, you're  
19 holding onto a worthless token that does nothing for you.  
20 You cannot --

21 THE COURT: Has that been done here at all?

22 MR. WELSH: The efforts to get on an exchange?  
23 Yes, Your Honor. The defendant Krohn said it assured the  
24 public that they were making efforts to do so. As well as  
11:20:01 25 behind -- according to the allegations in the complaint, but

1 there were -- according to the complaint there were  
2 certainly efforts to get listed on an exchange and they made  
3 those statements public.

4 So not only is it the sale of software, it is --  
5 it is both the hosting of the software and then also with it  
6 a token that represents an interest in this ongoing venture  
7 in which the profits for the investors are based off of that  
8 interest and whether defendants are successful in increasing  
9 the value of it to provide investors the ability to resale  
10 it for profit.

11:20:41 10

At the same time, if investors are not -- if the project is not able to successfully drive demands, that interest will go down in value or will remain worthless.

11:20:58 15

THE COURT: So where in the document do they undertake to create the blockchain?

MR. WELSH: So where in the -- are you saying in the complaint itself of what efforts did they take?

THE COURT: I'm interested in if there is an undertaking in the contract.

MR. WELSH: So it's funny you bring up the contract, Your Honor, defendants keep pointing to that.

That was produced to the SEC after the complaint was filed. There is no -- there is no support for the idea that that was provided at all times. It certainly is consistent with some of the allegations in which they are promising to make

1 Green blockchains. But the contract itself is not just the  
2 basis of it.

3 I think that the Tenth Circuit in *Aldrich* and in  
4 *Continental Marketing* make clear that for purposes of *Howey*,  
11:21:40 5 you don't just focus on the contract itself, but you look at  
6 oral assurances, promotional materials, scheme of marketing,  
7 and other ways that a reasonable investor would understand  
8 the economic reality of the transaction.

9 THE COURT: Well, your suggestion is that there  
11:21:56 10 is a promise to create a blockchain as I understand your  
11 argument.

12 MR. WELSH: Yes, Your Honor.

13 THE COURT: Now, where do I find that  
14 undertaking?

11:22:03 15 MR. WELSH: Where do you find that? In their  
16 promotional materials on their website and repeated by all  
17 three defendants throughout the relevant time period.

18 THE COURT: It doesn't appear in the contract.

19 MR. WELSH: In the investment contract itself?

11:22:21 20 THE COURT: In the document that was signed.

21 MR. WELSH: That was shown on the screen? Are  
22 you talking about the terms and conditions? Yes, those were  
23 disclaimers, Your Honor. They do reference the Green  
24 blockchain several times within there. They call it Green  
11:22:35 25 Rewards within that document. It was called the Green Token

1 in other instances. It was called Green in other instances.

2 THE COURT: Am I buying something other than the  
3 machine?

4 MR. WELSH: You're buying a machine which is the  
11:22:47 5 only way to obtain the Green Tokens which are only valuable  
6 based off of the innovation and the need for the blockchain  
7 being an actual purposeful technology.

8 THE COURT: Innovation by whom?

9 MR. WELSH: By Green United. It is Green  
11:23:03 10 United's product. They are the creators of the Green  
11 blockchain.

12 THE COURT: Was that done?

13 MR. WELSH: No. As he said, as opposing counsel  
14 just said, like the token eventually came out, it was an  
11:23:15 15 ERC-20 token for the Ethereum blockchain. There was no  
16 Green blockchain according to --

17 THE COURT: The green blockchain promised.

18 MR. WELSH: It was promised, yes.

19 THE COURT: In the promotion material?

11:23:26 20 MR. WELSH: Yes.

21 THE COURT: In the written contract?

22 MR. WELSH: The written contract is a terms  
23 condition which referenced the token and the Green  
24 blockchain and say that that is what is involved in there,  
11:23:36 25 yes.

1 THE COURT: So that I am buying something other  
2 than the machine.

3 MR. WELSH: Yes. You're buying the machine --  
4 the best way to view the machine itself, Your Honor, back to  
5 what mining is, it's a vehicle for the distribution of the  
6 tokens. There is no other reason to buy a miner other than  
7 to obtain what is going to be provided by the algorithm when  
8 run.

9 THE COURT: Okay.

11:23:59 10 MR. WELSH: So and then going back to the  
11 question of what has been stated and like what was done  
12 versus what was promised to the public, I think it is  
13 important to emphasize the difference between what was  
14 represented to investors and what is reality.

11:24:15 15 When it comes to Ponzi schemes, the fact that  
16 they promise that profits are coming from their investments  
17 does not change the fact that if they receive -- that they  
18 received payments. That's not a fraudulent statement or  
19 deceptive statement which I'll go into later on, it is the  
11:24:29 20 focus for the purposes of *Howey* what would a reasonable  
21 investor understand based off of the promises that were  
22 made. And then when we move to fraudulent statements, it is  
23 what was stated and whether or not that was true.

24 THE COURT: Yes. He particularly emphasizes the  
11:24:46 25 absence of statements by Mr. Thurston.

1 MR. WELSH: Yes, Your Honor. And I think that's  
2 -- that's purposeful for the fact that we don't bring a  
3 misstatement fraudulent claim against Mr. Thurston. That  
4 can be explained simply that way. There are two types of  
5 fraud claims in this case. The first are for material  
6 misstatements. Those are only brought against Mr. Krohn and  
7 Green United.

8 THE COURT: Okay. And not against Mr. Thurston.

9 MR. WELSH: No. The second are deceptive -- it  
10 is called scheme liability in which you take actions or  
11 deceptive conduct in furtherance of a fraudulent scheme.

12 THE COURT: And what are you pointing to on the  
13 part of him that indicates that he is in some fashion  
14 responsible?

11:25:28 15 MR. WELSH: So first is the marketing statements  
16 related to the Green blockchain and the Green token.

17 THE COURT: Now did he create those?

18 MR. WELSH: He was -- he was the founder and  
19 controller of the entity Green United. It is like this is  
11:25:45 20 not a GE or a larger company in which it is a large -- large  
21 -- this is a startup company found a year before. This is  
22 their sole product. And he was publicly making statements  
23 as cited in the complaint based off of the representations  
24 of what Green did, what the Green blockchain was, and what  
11:26:04 25 they were doing for the cloud hosting services.

1 THE COURT: Now, where do I find that in  
2 reference to Thurston in the complaint?

3 MR. WELSH: So in the complaint, I'd point you to  
4 when it comes to fraudulent statements so there are a couple  
5 here, Your Honor, so bear with me but I'll keep it brief.

6 THE COURT: I'm interested in him particularly  
7 because of the assertion and the examination looking for a  
8 specific time and place and person.

9 MR. WELSH: Okay. So I will start with  
10 Paragraph 26. I would say that knowing that the investors  
11 were discovered that the mining software did not operate as  
12 advertised, Thurston took steps to discourage investors from  
13 taking host of the mining machine themselves.

14 THE COURT: Now, what did he do besides take  
15 steps? How -- how have we described that?

16 MR. WELSH: So like starting, I think, in late  
17 2018 he started prohibiting any Green boxes or Green nodes  
18 from being sent to investors. He gave a presentation in  
19 which he said that we would handle everything. We have the  
20 abilities, we have access to cheap power, we have the  
21 sophistication and know how to successfully operate one of  
22 these machines. I think --

23 THE COURT: You're not pursuing him, you're just  
24 -- for plain old common law fraud.

11:27:21 25 MR. WELSH: No, it is furtherance of a scheme. I

1 think a similar way of thinking about this is more -- it is  
2 a rough analogy, Your Honor, but think of this more in the  
3 lines of conspiracy with steps towards --

4 THE COURT: Do you have a case that you rely on  
11:27:35 5 that proposition?

6 MR. WELSH: Yes, Your Honor, bear with me. At a  
7 high level I would point to *Lorenzo* to state that, a Supreme  
8 Court case, that states that while securities laws may  
9 overlap, they can be based on the same statements or same  
11:27:53 10 materials.

11 Your Honor, I point to Page 16 of our brief.  
12 There is *SEC versus Winemaster*, which is a Northern District  
13 of Illinois case which relates to this. There is also, at  
14 the bottom, *SEC versus SeeThruEquity, LLC*, in SDNY, which  
11:28:40 15 denied a motion to dismiss the complaint where the  
16 defendant's entire business model, beyond any  
17 misrepresentations or omissions, was deceptive. I think  
18 that ties here where they're offering and marketing a  
19 material which does not exist at all at any time.

11:28:54 20 But most importantly --

21 THE COURT: Now the material that did not exist  
22 was what?

23 MR. WELSH: The termination did not exist.

24 According to the complaint, as we are at the pleading stage,  
11:29:05 25 Your Honor, the complaint alleges --

1 THE COURT: I am just asking you to tell me what  
2 it is that you're talking about.

3 MR. WELSH: The offering is the software that  
4 they are offering was not mining Green Nodes, it was not a  
5 Green mining software. It was mining bitcoin. And why --  
6 this is an important point to emphasize, Your Honor. The  
7 software and what it did, could be purchased on the public  
8 market for substantially lower prices. They were selling  
9 the product at substantially higher product not because it  
10 is mining bitcoin, because it mined this brand new very  
11 innovative technology that the only way you would be able to  
12 get it is through this. And look at all of the ways that we  
13 are going to develop it and it is going to make you profit  
14 up to 200 percent return on the investment.

24 THE COURT: It's promised but not produced.

11:30:18 25 MR. WELSH: Correct, Your Honor. And the final

1       one I think is critical here is that Thurston knowing that  
2       they did not have Green blockchain, knowing that the Green  
3       Node did not -- the Green token did not exist, distributed  
4       to people a year after it started selling the Green Boxes an  
11:30:42 5       ERC-20 token which they called Green and said that this is  
6       the Green token that you were supposed to receive.

7               That is the deceptive conduct in the way -- the  
8       analogy I would use there, again, is going back to Ponzi  
9       schemes. If you said I'm going to give you a payment from a  
11:30:58 10      Ponzi scheme and you receive that payment, that is a  
11      deceptive -- that is a deceptive act. You can't --  
12      defendants could not argue in that circumstance well they  
13      received money, so we did what they promised to do. You  
14      would deceive them by providing them money that did not come  
11:31:15 15      from the source you said it would come from.

16               And, again, and I want to point to Your Honor,  
17       there is an emphasis on *SEC versus Malouf* which we do agree  
18       applies here, and when it comes to statements made by others  
19       and his lending credence to it. I want to give some more  
11:31:38 20      context in that circumstance. *Janus*, the Supreme Court case  
21       referenced by defense counsel, related to material  
22       misstatement fraud claims. This is scheme liability claims.  
23       There are several courts, and it is our briefing, Your  
24       Honor, stated that *Janus* has no application to scheme  
11:31:59 25       liability determinations.

With respect to that presentation, Mr. Krohn who  
was hired by Green United which Mr. Thurston has control  
over, was on stage saying that individuals could --  
individuals could, sorry, said on stage that Green in April  
2018, "Green was currently valued at .02 per token. Green  
Boxes were producing \$100 each month, and users could expect  
generating a return of 40 to 50 percent on their  
investments." This is Paragraph 40 of the complaint.

9 THE COURT: Now, who said that?

11:32:48 10 MR. WELSH: This is -- this is Mr. Krohn, Your  
11 Honor.

12 THE COURT: Mr. Krohn.

13 MR. WELSH: The other co-defendant, Mr. Krohn.

14 THE COURT: Okay.

11:32:55 15 MR. WELSH: At the presentation was Mr. Thurston.  
16 By being there, and by *SEC versus Malouf*, he lended credence  
17 to the statement.

18 Now this is one aspect of the subsequent conduct.

19 The SEC only needs to allege one but we allege several and  
11:33:15 20 it's outlined in our opposition to the motion to dismiss the  
21 multiple ways that deceptive conduct occurred. The emphasis  
22 is it does not need to be a material misstatement, it just  
23 needs to be steps to, efforts to conceal. That can be  
24 actions, it can be statements themselves, it can be material  
11:33:33 25 misstatements, it can be truthful statements that omitted

1 certain facts.

2 THE COURT: I'm old-fashioned to the point where  
3 I'm interested in specifics. And generalities don't help me  
4 very much.

11:33:52 5 MR. WELSH: Very good, Your Honor. Would you  
6 appreciate some more specifics as to deceptive conduct in  
7 that way or just move on to material misstatements by  
8 Mr. Krohn or United? I can walk you through -- I would  
9 point to --

11:34:15 10 THE COURT: Respond to counsel's argument.

11 MR. WELSH: Okay. Very good.

12 THE COURT: Tell me why I shouldn't grant his  
13 motion?

14 MR. WELSH: So, with respect to the common  
11:34:25 15 enterprise element, I want to back up and kind of emphasize.  
16 A majority of courts, as the slide he presented related to  
17 an SEC brief in another case, a majority of courts applied  
18 one of two tests when it comes to common enterprise. There  
19 is horizontal commonality, which essentially is that all  
11:34:48 20 investors share in the rise and fall of profits together.  
21 Then there is vertical commonality which essentially stands  
22 for the proposition that the promoter and the investor share  
23 in the profits and risks of the investments.

24 In *McGill*, the Tenth Circuit rejected application  
11:35:11 25 of these tests as too rigid. Instead, it stated that the

1 economic reality -- the court should examine the economic  
2 reality of the transaction so that when a transaction in  
3 substance involves an investment, common enterprise is  
4 present. What the Tenth Circuit is saying is to look at the  
11:35:30 5 facts and apply common sense. Defendants are arguing that  
6 in rejecting the rigid test, the Tenth Circuit instead  
7 wanted to apply additional requirements that are not  
8 required by any other courts.

9 An emphasis on how the court should look at the  
11:35:53 10 common enterprise can be seen by the repeated cases applying  
11 the same or similar circumstances in the District of Utah.  
12 In *SEC versus Art Intellect* in 2013, in *Berrios-Bones v*  
13 *Nexidis, LLC*, in 2007, and *Campbell versus Castle Stone*  
14 *Homes* in 2011. In all of these cases, the court's emphasize  
11:36:15 15 the determining factor of common enterprise and economic  
16 reality of transaction is whether or not the investment was  
17 for profit.

18 Defendant answered that question. There is no  
19 other utility, there is no other profit, than what was  
11:36:28 20 provided out through the software and mining machines.  
21 Counsel argues that we need to share common characteristics  
22 of stock. The Supreme Court has rejected that argument. In  
23 their reply brief they say, well, it's certain  
24 characteristics of stock. It's specifically sharing in the  
11:36:46 25 operational profits of the company. That does not follow

1 the law. A District of Utah case *Traffic Monsoon*, in that  
2 case, the profits came from an advertising marketing scheme  
3 in which all profits came from the additional members  
4 joining the marketing scheme, not from the company. *SEC*  
11:37:07 5 *versus Gary Plastics*, a Ninth Circuit case in which JP  
6 Morgan sold certificates of deposit with guaranteeing  
7 returns. That had nothing to do with the profits of JP  
8 Morgan, it had to do with certificates of deposit. That was  
9 found to be a common enter -- that was found to be an  
11:37:25 10 investment contract and a common enterprise under what the  
11 test that Tenth Circuit applied described as rigid.

12 Specifically here, at summary judgment, courts  
13 around the country have found that digital-assets is  
14 substantially similar to the ones alleged here are in  
11:37:46 15 themselves an investment contract regardless of whether the  
16 profits come from the company or not. It is the same  
17 arguments that have been rolled out in *SEC versus Kik* in the  
18 District of New Hampshire -- I'm sorry, *SEC versus Kik*  
19 *Interactive* in the Southern District of New York, *SEC versus*  
11:38:02 20 *LBRY, Inc.*, in the District of New Hampshire, and *SEC versus*  
21 *NEC -- NAC Foundation* in the Northern District of  
22 California. At summary judgment, all three have found that  
23 with distribution of token to investors in which they are  
24 fungible and the same like here and they rise and fall  
25 together in price, is the common venture. That is the

1 investment scheme. It doesn't need to be the operating  
2 company of the common enterprise. There is no test, nor no  
3 Supreme Court case that says the profits must come from the  
4 company. It says that it comes from the joint venture and  
11:38:40 5 the joint venture is the investment scheme where the profits  
6 are coming from they all get them together.

7 An analogy I would use, Your Honor, for this is  
8 when it comes to franchise cases. A franchise agreement is  
9 not a security if the franchisee gains control over the  
11:38:57 10 franchise. That way, they themselves can work and make  
11 their own money through their franchise. If the franchisor  
12 retains control over the franchisee and can exercise board  
13 discretion over the company, it becomes a security because  
14 the individual's franchisees have no authority or power to  
11:39:19 15 exercise control and therefore make profits.

16 So that is what -- that is at issue here, is that  
17 investors did not have control over whether or not they made  
18 profits. They were inextricably intertwined with the  
19 promotor and the profits and risks rose and fell together.  
11:39:36 20 That is alleged in the complaint and it's backed up by  
21 allegations and the factual allegations throughout.

22 THE COURT: Now might be a good time to stop and  
23 have counsel take his five minutes that he asked for.

24 MR. WELSH: Thank you, Your Honor.

11:39:50 25 THE COURT: And then we'll let you respond as

1 well.

2 MR. KRYSA: Thank you, Your Honor. Thomas Krysa  
3 for defendant Kristoffer Krohn. A little background on  
4 Mr. Krohn. He is a Utah resident, he is an entrepreneur.  
11:40:06 5 He is alleged in this case to have made a few, a handful of  
6 false statements related -- in connection with selling these  
7 Green boxes which were crypto mining assets we have been  
8 talking about.

9 It's important to note that he is alleged to have  
11:40:19 10 made not scienter based violations but only negligence based  
11 violations. So the government, in part, is basing a fraud  
12 case on Green United based on negligent -- alleged negligent  
13 statements from my client which I think is interesting to  
14 note.

11:40:34 15 THE COURT: Well, whether they characterize them  
16 as negligent or otherwise, did he make the statements?

17 MR. KRYSA: He is alleged to have said the  
18 statements in the complaint so at that point in time -- at  
19 this point in time he can't contradict that. And we'll talk  
11:40:47 20 a little bit about those statements.

21 He is alleged to have made these statements  
22 though in April and May of 2018. So it's important to note  
23 that this is the very beginning of the fact pattern here.  
24 Mr. Krohn was involved early for the first six months. He  
11:41:01 25 was getting his information from Green United and Thurston

1 and he was relying upon that information.

2 After December 2018, he was no longer involved  
3 with selling Green Boxes and it is also important to note he  
4 didn't sell any of the software, he didn't sell the Green  
11:41:17 5 Nodes in this case.

6 So, counsel for Green United set forth in  
7 extensive detail arguments supporting his motion, their  
8 motion, and we would join those arguments in the interest of  
9 time, Your Honor, but I do want to highlight a few aspects  
11:41:32 10 of this.

11 I still think that respectfully counsel for the  
12 government is avoiding the elephant in the room. They're  
13 not addressing *McGill* directly. *McGill* clearly states that  
14 for a product sale to be an investment, it has to look like  
11:41:48 15 stock. It has to have stock characteristics. *McGill* was  
16 upheld two years later in *McVay*, and *McGill* is consistent  
17 with *Howey*. If you look at *Howey*, which is the seminal case  
18 here that everything goes back to when you're talking about  
19 an investment contract, there is three or four quotes in  
11:42:04 20 *Howey* that emphasize the importance of receiving profits in  
21 the venture.

22 On Page 299 of that case, Your Honor, the court  
23 says, "they are offering an opportunity to contribute money  
24 and to share in the profits of a large citrus fruit  
11:42:22 25 enterprise managed and partly owned by respondents."

1 Page 300, "thus all of the elements of a profit seeking  
2 business venture are present here. The investors provide  
3 capital and share in the earnings and profits. The  
4 promoters manage, control, and operate this enterprise."

1 venture. Therefore, that's dispositive. And Your Honor we  
2 would ask that the complaint be dismissed with prejudice  
3 again because the SEC has had plenty of time to establish  
4 these facts.

11:44:22 5 With respect to the allegations against  
6 Mr. Krohn, the allegations are -- there are two or three.  
7 He said, at a presentation, that Green was valued at two  
8 cents per share, two cents, and the Green Boxes could  
9 produce \$100 each month. And as a result they were  
11:44:40 10 generating a 40 to 50 percent return per year. So they cost  
11 \$3,000. If you used them every month, they could produce  
12 about \$1,200. So that's what he was referring to. He said  
13 these at one presentation. The complaint lacks detail about  
14 when the presentation was, who was there. And the  
11:45:00 15 allegation is then this presentation was posted to the  
16 internet and viewed by people. We don't know who viewed it,  
17 we don't know how long the presentation was up, we don't  
18 know if there was any paid views of that presentation  
19 because the complaint lacks detail and is insufficient under  
11:45:15 20 9(b). So in our view, the fraud claim against Mr. Krohn  
21 should be dismissed or at least re-pled.

22 Finally, Your Honor, I would like to touch on  
23 concepts of fundamental fairness and due process just very  
24 briefly. You know that under the law Mr. Krohn was entitled  
11:45:37 25 to know whether or not he was subject to SEC regulation back

1       in 2018, and he simply didn't have fair notice that selling  
2       computer hardware to purchasers would constitute selling  
3       securities. And here the SEC is essentially moving the  
4       goalpost five years later. They're coming in and basically  
11:45:59 5       saying something you did five years ago, selling computer  
6       hardware, now constitutes selling securities.

7                   THE COURT: Well, they suggest it was something  
8       in addition to the hardware.

9                   MR. KRYSA: Well, it was -- it was the ability to  
11:46:13 10       mine cryptocurrency. Again, this concept is difficult to  
11       understand, and if they use the hardware and mine the  
12       cryptocurrency, they might get something of value.

13                   THE COURT: Well, they might make some money.

14                   MR. KRYSA: Yeah, they might mine some gold they  
11:46:28 15       could appreciate in the future. But they didn't have any  
16       interest in the Green United Company. If Green United sold  
17       a billion Green Boxes and became a Fortune 500 company, a  
18       purchaser of a Green Box would not make another nickel.  
19       That's the point I think of what the Tenth Circuit is trying  
11:46:46 20       to get across, that's the point of what *Howey*, the *Howey*  
21       court, 1926, was trying to get across.

22                   THE COURT: When you buy shares you not only  
23       participate in the profits down the road, but on occasion  
24       you even participate in the losses.

11:47:02 25                   MR. KRYSA: Correct. Correct. But, Your Honor,

1 I want to note just briefly that the SEC has established a  
2 cyber unit. I believe these gentlemen may be members of it.  
3 It's about 50 people in that unit, they just doubled it a  
4 few years ago. And the SEC is on a mandate to regulate this  
11:47:22 5 industry and to put a toehold into this industry and they  
6 really don't care who they run over. And if you think about  
7 my client's perspective back in 2018, how could he have  
8 known that he was selling a security? How could he have  
9 known that he needed to have a license and be registered  
11:47:36 10 with a broker/dealer and to make sure that the computer  
11 hardware he is selling, the shovel, had to be registered  
12 with the SEC. And now he is stuck in a conundrum. Five  
13 years later he is in litigation with the federal government  
14 and they're seeking half a million dollars from him. That's  
11:47:57 15 not fair. He didn't have fair notice. And the court can  
16 dismiss the complaint on that basis. And we ask you to do  
17 so.

18 THE COURT: Counselor.

19 MR. WELSH: Thank you, Your Honor. I'll be brief  
11:48:12 20 and I appreciate the time. Just three quick points. First,  
21 counsel brought up *Howey*. I just want to emphasize this.  
22 *Howey* was involved in an investment scheme where investors  
23 purchased a portion of an orange grove managed by a company  
24 WJ *Howey*. The venture was the orange grove. It was not WJ  
25 *Howey*.

11:49:01 10 We are not doing anything complex or novel here.  
11 We're simply applying the securities laws as they have been  
12 in existence since the 1930s, the value of the contract that  
13 exists consistently and repeatedly evaluated, analyzed in a  
14 range of transactions, businesses, and entities.

11:49:18 15 There is no new rule promulgated. There is no  
16 application. It is enforcement of a law from the 1930s.  
17 Whether or not it is an investment contract is determined by  
18 decades of precedent after *Howey* and along with its progeny.  
19 The fair notice arguments have been rejected multiple times  
20 on that point.

21 And finally, with respect to Mr. Krohn, the  
22 statements he was making and the money that we're seeking  
23 are commissions that he made off of making statements such  
24 as in 2018 that Green was currently valued at .02 a token.  
11:49:51 25 He was at least negligently reckless in making that

1 statement because, and it's a verifiable information from a  
2 public market, not only did the token did not exist, but it  
3 wasn't listed anywhere. So where did the price come from?

4 That is the statement we're making. And the real  
11:50:11 5 -- the real victims here are the investors who listened to  
6 these statements. They take issue with us not pleading  
7 reliance. We do not need to plead reliance as the SEC. But  
8 sure enough there are plenty that listened to those  
9 investors and discovery will bear that out.

11:50:28 10 With that, I will answer any further questions,  
11 Your Honor. Thank you.

12 MR. GANNON: Your Honor, may I reply?

13 THE COURT: Sure.

14 MR. GANNON: Thank you and may it please the  
11:50:39 15 court. Your Honor, I'll begin where I started in my opening  
16 argument which is with *McGill*. The SEC, again, avoids the  
17 key language of *McGill*. They didn't talk to you about it.  
18 And there it is right on the screen. That is, "the  
19 transaction is in reality an investment that is a  
11:50:58 20 transaction of a type in which stock is often given and it  
21 creates a common enterprise which gives rise to a security  
22 falling within the ambit of the 33 and 34 acts."

23 We're not trying to say -- we're not trying to  
24 say horizontal commonality, vertical commonality, anything  
11:51:15 25 else. We're talking about *McGill*, *McGill* and *Howey*. And it

1 is -- it is pretty straightforward. And I'm surprised that  
2 the SEC tries to talk about, for example, district court  
3 cases in Utah like an unreported case, *SEC versus Art*  
4 *Intellect* in which that case relied on *McGill* or *Traffic*  
11:51:35 5 *Monsoon* in which in that case the people who were the  
6 victims got to share in the revenues of *Traffic Monsoon*. Or  
7 the *LBRY* case which is on the other side of the country in  
8 New England, but that case is on appeal to the First  
9 Circuit. So how a district court case on different facts in  
11:51:53 10 New Hampshire could somehow overrule *McGill* is beyond me.

11 And the notion that profits don't have to come  
12 from the company itself, and the Supreme Court has never  
13 held that, I would say in *Tcherepin*, *Edwards* and *Howey* they  
14 all said that. So I'm puzzled as to where this comes from.

11:52:17 15 But I would also note, Your Honor, that the --  
16 Mr. Welsh said in response to your question as to whether  
17 this was a common enterprise and you asked what does it do,  
18 and the answer was, and these are my notes so I don't  
19 attempt to quote Mr. Welsh but I'm pretty sure I'm close,  
11:52:36 20 "users receive the token, they hold on, and they hope the  
21 price will go up." That's exactly the discussion we had  
22 about the Utah Jazz tickets.

23 But even more to the point in *McGill*, and perhaps  
24 we can get that up again, again in the *McGill* case it said,  
11:52:55 25 "Mr. McGill purchased the right to participate in the joint

1 ventures's operating profits. Not merely the right to enjoy  
2 capital appreciation." If I buy a baseball card and I hope  
3 it is going to go up in value because I think a particular  
4 -- or I buy a Deon Sanders card because Colorado just beat  
11:53:12 5 TCU and I think that is going to go up in value, that is not  
6 a security. It may be a speculation on my part, but it  
7 certainly isn't a security.

8 I would note in passing that the SEC says terms  
9 and conditions include disclaimers. The terms and  
11:53:28 10 conditions are the contract and those terms under Utah law  
11 are enforceable.

12 I would also note that the -- when you were  
13 asking the SEC am I getting something other than the machine  
14 and the response was, well, no, but the machines generate  
11:53:46 15 rewards. Well, that's a form of money. That's what we have  
16 been talking about. And it is -- money doesn't have to be  
17 U.S. dollar bills. In this day and age it can be all sorts  
18 of forms. For example, American Express. We can have an  
19 American Express card and I can go in a particular lounge  
11:54:04 20 somewhere and say, I would like to use my American Express  
21 card. They won't take it. Just like I can go in and say, I  
22 would like to use Green Rewards. Sorry, we're not going to  
23 take it. It took American Express a long, long time to  
24 build up its market. Perhaps it's going to take Green  
11:54:18 25 Rewards just as much time. But it doesn't mean there is any

1 difference between the two of them.

2 The other thing that I want to make sure that  
3 we're very careful about what the complaint says,  
4 particularly with respect to Mr. Thurston, and I want to  
11:54:33 5 repeatedly emphasize that the allegations about Mr. Thurston  
6 for the most part are conclusory and they don't contain  
7 sufficient detail.

8 So, for example, the SEC said Mr. Thurston was  
9 the founder and controller of Green United. I asked the SEC  
11:54:50 10 to tell me where it says that he controlled Green United.  
11 The complaint does not say that. He founded Green United,  
12 that doesn't mean he controlled Green United. And if you  
13 don't allege it, you can't rely on it.

14 So in -- as to the next point, they wish to rely  
11:55:07 15 on *Lorenzo* in connection with scheme liability. But again,  
16 Your Honor, *Lorenzo* required a duty and dissemination of  
17 false information. There is no allegation that Mr. Thurston  
18 disseminated any false information and there is no duty that  
19 he -- that he even knew the people that were in the room  
11:55:26 20 where he supposedly was listening to misstatements and not  
21 saying anything. So no dissemination properly alleged.

22 And finally, the SEC said that we, I suppose  
23 meaning my client, deceived them, meaning the customers, by  
24 giving them money, remember that, giving them money, that  
11:55:53 25 came from a different source other than what you told them.

1 That I believe was what Mr. Welsh was saying by analogy was  
2 part of the fraud here.

3 But what the SEC has failed to do in the  
4 complaint and today, is to define why these particular  
11:56:09 5 sources were material. They failed to allege completely  
6 what difference would it make and whether they would have  
7 been any difference in value. There is no statement in the  
8 complaint that gee, the source was different and therefore  
9 the value would have been different and I would have gotten  
11:56:28 10 something different than I was promised.

11 So again, Your Honor, I think really from our  
12 perspective the simplest and we literally end where we  
13 started which is to go back to *McGill* and it's the language  
14 of *McGill* that should be controlling here. *McGill*, as I  
11:56:48 15 believe we have demonstrated, totally consistent with the  
16 blue sky cases which started common enterprise, totally  
17 consistent with the Supreme Court's teachings. *McGill* has  
18 never been reversed, overruled, or modified. And *McGill* has  
19 the common enterprise element.

11:57:05 20 The SEC is trying to avoid the common enterprise  
21 element. And I suppose to their credit, in 2019 they told  
22 us, because they put it up on their website, they don't  
23 think the common enterprise element is required under the  
24 *Howey* test. *McGill* says otherwise. We should follow *McGill*  
11:57:23 25 and this case should be dismissed. Thank you, judge.

1 THE COURT: Anybody else?

2 MR. WELSH: Your Honor, very, very briefly. And  
3 I appreciate it. Just to respond quickly to those comments.

4 First, for *McGill*, and that statement within it,  
5 I encourage the court to read the aspect of the portion of  
6 the patents where that comes from and which is explaining in  
7 dicta what the standard is in rejecting those and looking at  
8 economic reality of the transaction.

9 Every -- the only cases that they -- that  
10 opposing counsel can point to in which an investment  
11 contract was dismissed at a pleading stage is for commercial  
12 loans. Across the board in all other cases and all types of  
13 other schemes from the District of Utah, District of  
14 Colorado throughout the Tenth Circuit have read that to mean  
15 that economic reality of the transaction. That is what  
16 matters here. With that, I will rest, Your Honor.

17 THE COURT: In reference to Mr. Thurston, counsel  
18 has somewhat clarified the nature of the fraud action  
19 against Mr. Thurston. I think the rule requires to be, in  
20 reference to Mr. Thurston, to be explicit. If you're  
21 relying upon some other form of fraud, you in turn need to  
22 be explicit.

23 I'll grant the motion to dismiss, with leave to  
24 amend, Mr. Thurston's, that is, the SEC's claim against  
25 Mr. Thurston in reference to fraud, but just in reference to

1       fraud. Whether it's stated expressly or indirectly, that  
2       needs to be clarified with some degree of care.

3 As to the remaining motions, I'm going to reserve  
4 on those. It's an interesting case, but I'm going to place  
5 a burden on counsel. I want both the moving parties, in a  
6 couple of weeks, to file with the court their explanation of  
7 what a Green Box is, and their explanation of what's being  
8 sold including not just the machinery, but if something else  
9 is being sold, I want you to tell me what it is. And if  
10 there are separate -- is there are separate software,  
11 explain to me what software that you're talking about and  
12 give me an example.

22 And if defendants will respond -- if the  
23 defendants would get to me -- get the material to me by not  
24 later than the 25th of September, and let's have the United  
25 States respond by Friday the 13th of October I would

1 appreciate that. And if it is the kind of thing where we  
2 need to set it down, we will in the regular course. But I'm  
3 eager to be educated in the -- in the esoteric area that  
4 people are talking about. I'm going to try to make it as  
12:03:32 5 simple and as direct and as understandable as possible.

6 So good luck. I'll reserve on the matter until I  
7 get those and we'll take a look.

8 MR. GANNON: Your Honor --

9 THE COURT: Appreciate your help. Thank you very  
12:03:50 10 much.

11 MR. GANNON: Thank you, Your Honor.

12 THE COURT: You may be excused unless there is  
13 anything else to worry about.

14 MR. GANNON: No, sir.

12:03:57 15 THE COURT: You may be excused. I was going to  
16 ask counsel for the moving party, where I have granted the  
17 fraud motion, if you will prepare and submit a suggested  
18 form of order within 10 days.

19 MR. GANNON: Yes, Your Honor, we will.

20 THE COURT: I would appreciate that. Run it by  
21 counsel.

22 (Court adjourned at 12:04 p.m.)

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1 **REPORTER'S CERTIFICATE**  
2

3 I, Laura W. Robinson, Certified Shorthand  
4 Reporter, Registered Professional Reporter and Notary Public  
5 within and for the County of Salt Lake, State of Utah, do  
6 hereby certify:

7 That the foregoing proceedings were taken before  
8 me at the time and place set forth herein and were taken  
9 down by me in shorthand and thereafter transcribed into  
10 typewriting under my direction and supervision;

11 That the foregoing pages contain a true and  
12 correct transcription of my said shorthand notes so taken.

13 In witness whereof I have subscribed my name  
14 this 12th day of September, 2023.

15

16

Laura W. Robinson

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RPR, FCRR, CSR, CP

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